The Real Estate M&A and Private Equity Review

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Editors

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Chapter 19

SPAIN

Jaime Diaz de Bustamante[1]

I OVERVIEW OF THE MARKET

Since 2015, the Spanish real estate market has seen the entrance of not only different types of foreign investors and funds (core, core-plus and value added) but also, as a consequence of investment funding, a more professional model of working, A brief review of what has been happening since 2015 is relevant to get an in-depth understanding of the current situation in the Spanish market.

In 2015, foreign investment aimed at acquiring (1) Spanish bank management platforms (Altamira, Haya Real Estate, Aktua, Servihabitat, Aliseda); (2) several shopping malls and office buildings from traditional developers; (3) plots with advanced development planning status – specifically, the acquisition of plots by foreign funds commenced before 2015 (e.g., Castlelake or Lone Star); and (4) share quotas in the newly incorporated Spanish real estate investment trusts (SOCIMIs).

The above-mentioned situation continued in 2016, with more or less the same participants in the market purchasing either Spanish companies and their real estate assets (share deals) or the assets directly (asset deals).

During 2016, the market began to experience a mild transformation. While the purchasing of sought-after real estate product has become ever more challenging, with pre-crisis price levels (due to an increasing shortage of prime assets and corresponding price increases), new Spanish developers (Neinor Homes, Aedas, Homes, Vía Celere, Dos Puntos Inmobiliaria), who have been purchasing plots since 2013, have been initiating their residential developments throughout the Spanish territory.

As of 2017, real estate investors are being granted more funds by capital markets (Neinor Homes was listed on the Spanish stock exchange on 24 March 2017 and press announcements have also been made in this regard about companies such as Aedas and Hotel Investment Partners).

Real estate investors are also restructuring their portfolios. In this context, Blackstone recently sold Logicor to China Investment Corporation (CIC), Merlin Properties sold its hotel portfolio to Foncière des Regions and Hispania is divesting its office portfolio.

Finally, investors have also been negotiating the acquisition of residential assets as a result of the competitive divestment processes undertaken by SAREB and some Spanish banks (Banco Popular).

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Further significant transactions are expected prior to the end of 2017, and core funds will have a greater role in the market, taking advantage of divestments of real estate assets by more opportunistic and value-added funds.

II RECENT MARKET ACTIVITY

i M&A transactions

The key M&A transactions in the Spanish real estate market took place in 2015 and 2016.

Nevertheless, prior to that date, the incorporation of the Spanish 'bad bank', SAREB, had a huge impact in the market, because all the Spanish banks with severe deficits in their balance sheets in relation to real estate assets (Bankia, BMN, Caja 3, Cataluña Caixa, Ceiss, Banco Gallego, Banco de Valencia, Liberbank and NCG) had to transfer these real estate assets to SAREB.

While SAREB, a company created for the disinvestment of banking real estate assets, was organising its management and structure, Spanish banking platforms were purchased by foreign investment funds to manage the sale of SAREB's assets, among other things.

The creation of SAREB was the largest transaction made in Europe, amounting to around €55 billion, with nearly 200,000 assets (REOs and loans) and over 400,000 collaterals (mortgaged assets). Regardless of these impressive figures, the real relevance of this transaction lies in the fact that (1) it formed the basis for the relaunch of the real estate market in the following years; and (2) foreign investors took part or position in the share capital of Spanish bank management platforms (e.g., Lindorff in Aktua, Cerberus in HAYA Real Estate, TPG in Servihábitat and Apollo in Altamira).

According to the information provided by the real estate specialist press, SAREB is currently creating a SOCIMI, aiming to receive real estate assets under management (i.e., plots and works in progress).

A second remarkable transaction took place on 2 June 2017, when Blackstone sold 100 per cent of Logicor to CIC for €12.25 trillion.

Although the scope of this M&A transaction was pan-European, involving a total of 17 countries, including the United Kingdom, France, Germany and the southern European countries, Logicor Spain is considered Spain's largest logistics company, with over 1 million square metres, mostly located in Madrid and Barcelona.

Finally, a third notable transaction was the acquisition of Banco Popular by Banco Santander, for the symbolic price of €1, on 7 June 2017. According to articles released in the Spanish press,[2] this transaction implies that Banco Santander (1) assumes €29.8 billion in real estate assets from Banco Popular; and (2) will put said real estate assets on the market within the next 18 months, to balance Banco Popular's accounts. Initially, the divestment of major portfolios might be subject to organised and competitive sale processes aimed at foreign investors or funds.

In this context, a new opportunity in the market shall arise during 2017 and 2018, regarding (1) the divestment of Banco Popular's real estate assets; and (2) divestments executed by more opportunistic and value-added funds that purchased real estate assets during the past few years.

2 See, for example, *El Mundo*, 26 June 2017.

ii Private equity transactions

From a private equity (PE) point of view, and in addition to the massive competitive divestment processes that have taken place in recent years (e.g., Project Hercules, Project Octopus, Project Lion and Project Buffalo) there have been three main transactions in 2016 and 2017 so far.

First, the sale of 19 hotel buildings (Eurostars Grand Marina in Barcelona, NH Collection Madrid Colón and Barceló Torre Madrid, among others) from Merlin Properties SOCIMI to Foncière des Regions (through its subsidiary, Foncière des Murs) for €535 million in December 2016. Although the transaction, from an accountancy perspective, was concluded in December 2016, the final agreements were completed in 2017. This portfolio encompasses 3,645 rooms in hotels, mainly located in Madrid and Barcelona, and operated by Spanish chains, including NH, Barceló, Eurostars, Grupo Meliá and AC Hoteles.

A second signifcant transaction was the acquisition of Xanadú shopping mall by Intu Properties on 12 March 2017 from Ivanhoe Cambridge, for €530 million. The transaction was funded by Santander, Crédit Agricole, CaixaBank and BBVA. Subsequently, in May 2017, Intu Properties and TH Real Estate incorporated a company through which each company shall own 50 per cent of the Xanadú shopping mall. This transaction is valued at €264 million, and will be used by Intu Properties to repay part of the debt assumed by the funding banks. In addition to the shopping mall, these transactions include the acquisition of the associated management company and the company that manages the SnowZone. According to the Spanish press, the annual income rent of Xanadú is €23 million, with surface area occupation of 97 per cent, 220 shops, 153,000 square metres of gross leasable area (GLA), 8,000 parking spaces, an indoor ski slope, 15 cinemas and around 40 restaurants.

Finally, a third remarkable transaction has been the acquisition of Diagonal Mar shopping mall in Barcelona by Deutsche Bank, from Northwood Investors, for €495 million on August 2016. This acquisition comprises 60,400 square metres of surface area (the remaining 27,100 square metres of the shopping mall's total surface area are owned by Alcampo). Initially, Deustche Bank might invest approximately €30 million in refurbishment works, with the expectation of earnings before interest, tax, depreciation and amortisation (EBITDA) of €26 million in the next five years (the 2015 EBITDA was €20 million).

The above-mentioned transactions, along with other transactions that have taken place in 2016 and 2017 (e.g., acquisition of the Adequa office complex buildings by Merlin Properties SOCIMI for €380 million; acquisition of Edificio España by Grupo Baraka for €272 million and subsequent sale to Grupo Riu), are evidence that the Spanish market is booming, even if concentrated largely in Madrid and Barcelona. Two market areas that are currently the focus of particular interest are the residential and hotel segments.

III REAL ESTATE COMPANIES AND FIRMS

i Publicly traded REITs and REOCs – structure and role in the market

SOCIMIs (similar to REITs) are listed companies created for keeping the savings of either private investors or investment funds in real estate assets. More specifically, SOCIMIs are tax resources whose activity is the purchase, development and refurbishment of real estate assets.

SOCIMIs have been actively incorporated since 2016, not only because of their favourable tax regime (i.e., real estate income for SOCIMIs is taxed at a zero corporate tax rate, provided that some requirements are met by the SOCIMI), but also because of the favourable state of the Spanish real estate sector.

The four largest SOCIMIs in Spain (i.e., Merlin Properties SOCIMI, Hispania Activos Inmobiliarios SOCIMI, Axiare Patrimonio SOCIMI and Lar España SOCIMI) carried out transactions valued at over €1.4 billion in 2016, amounting to €13.79 billion in their balance sheets.

Merlin Properties SOCIMI is the major Spanish SOCIMI, an IBEX35 listed company, with a capitalisation value of €5.35 million, 1,157 real estate assets (offices, logistics and commercial) with 3,957,634 of GLA, an occupancy rate of 92.3 per cent and a gross annual rent of €463 million.

Up until 2017, 28 SOCIMIs had been listed on the Spanish market (17 of them were incorporated in 2016) and it is expected that 17 more will be listed by the end of 2017. The standard SOCIMI has five to 20 real estate assets on its balance sheet and is owned by non-resident shareholders, investing mainly in offices and residential buildings for leasing, and their assets are located in Madrid and Barcelona, with a controlled and moderate debt.

SOCIMIs specialise in different types of assets (residential, hotels, shopping malls, offices). As is the case with the four largest SOCIMIs, a typical SOCIMI scheme is based on the acquisition of urban buildings (hotels, residential or offices) for their refurbishment (rehabilitation).

The latest amendment to the SOCIMI regime (RDL 3/2016) took place in December 2016, modifying taxation for shareholders regarding the distribution of their dividends, such that the exemption regime of Article 21 of the Corporate Tax Law no longer applies to shareholders.

Finally, it is important to keep in mind that some of the SOCIMIs are currently repositioning their portfolios (e.g., Merlin Properties divesting its hotel portfolio, or Hispania its office buildings), so new players will join the Spanish real estate market.

ii Real estate PE firms – footprint and structure

Real estate PE firms have been active in the Spanish real estate market from 2015 to the present. Of these PE firms, five key names can be pointed out: Blackstone, Lone Star, Oaktree, CBRE Global Investors and Invesco.

Blackstone is definitely at the top of the most active investors list; firstly, it created the servicing company Anticipa Real Estate, through which around 40,000 residential mortgages from the former CatalunyaCaixa Inmobiliaria were purchased in 2015 for €4.123 trillion. From that date, Blackstone has been purchasing this type of secured debt, with a total investment of around €7 trillion.

Blackstone is currently creating special tax resources (SOCIMIs) with the contribution of over 5,000 leased houses spread throughout several Spanish locations (i.e., Albirana Properties SOCIMI SAU, Pegarena and Tourmalet).

Blackstone, through the SOCIMIs incorporated, intends to be the leading residential firm in Spain.

Another significant transaction is the above-mentioned sale of Logicor to CIC by Blackstone, with over 1 million square metres, mostly located in Madrid and Barcelona.

Through Neinor Homes (listed on 24 March 2017), Lone Star is the leading Spanish residential developer in terms of market capitalisation, with real estate properties amounting to €1 billion in first homes (75 per cent) and second homes (25 per cent) throughout the Spanish territory (Madrid, Pais Vasco, Cataluña, Andalucía and the Balearic Islands), and with annual expected sales of between 3,500 and 4,000 houses.

One of Neinor Homes' principal competitors, Varde Partners, purchased Dos Puntos Inmobiliaria (formerly San Jose Inmobiliaria), Aelca and Vía Célere in August 2015, June 2016 and February 2017 respectively.

Varde Partners' strategy is to invest €2 billion until 2021, to establish and sell around 2,000 houses annually; other competitors include Aedas (owned by Castlelake) and Kronos Investment, the corresponding figures for which are similar.

As stated, PE firms are characterised by having a foreign component, either through direct foreign investment funds or Spanish traditional developers purchased by foreign investors.

IV TRANSACTIONS

i Legal frameworks and deal structures

Overview

Fortunately, the Spanish real estate M&A market has assumed Anglo-Saxon legal schemes, as a consequence of a higher level of participation by foreign investors. Private agreements and normal commercial arrangements between the parties are standard business practice.

Basically, there are two kinds of purchase schemes: direct acquisition of the asset (asset deal) or acquisition of the company that owns the asset (share deal). The determining factors for investors in selecting between these legal schemes are essentially economic or tax based.

Both schemes are being used in two types of commercial processes. In this regard, the market comprises both competitive processes – either ordered by listed or bank entities; or off-market transactions, initiated by private or traditional developers or owners.

Competitive processes are used for organising huge portfolios by listed or banking companies (e.g., SAREB, BBVA, CaixaBank, Banco Popular, Banc Sabadell, Liberbank), while off-market processes are used in relation to single buildings or building complexes. Generally, investors prefer off-market processes, as they are more economical and flexible than the competitive ones.

Finally, there are two special kinds of transaction: the assignment of (1) credits or loans, commonly non-performed, secured or non-secured; and (2) credits or loans that are in a judicial phase, thus a subrogation in the process is required.

NBO and due diligence reports

In both cases and processes, once a non-disclosure agreement has been signed, transactions usually start with a non-binding offer (NBO) submitted subject to several conditions, one of which is a favourable due diligence report review either in relation to the asset or to the company, and in a standard term of within four weeks of the acceptance of the NBO. This term is considered an exclusivity period, provided that there are no more bidders in the transaction.

Investors usually demand red-flag due diligence reports, whereby eventual contingencies are identified and quantified, their risks evaluated and possible pre- or post-closing solutions determined.

In share deal structures, full legal and tax due diligence reports are commonly requested; where corporate, real estate, planning, tax, labour, IT or IP, and insurance issues are reviewed in asset deals, the scope is necessarily reduced to real estate, planning and tax.

Both planning and licensing consultancy are becoming key in the acquisition of real estate assets, because once the building has been purchased, investors frequently want to carry out rehabilitation works to create new parking spaces or change the use of the property.

These situations require in-depth due diligence reports, with not only a view of the property at the time of the formalisation of the sale and public deed acquisition, but also a report regarding the future legal and tax outlook for the property.

As previously mentioned, a typical transaction structure during 2016 and 2017 has seen investors purchasing a real estate asset with a view to its rehabilitation. In connection with Article 84.1.2 of the VAT Law 37/1992 (the VAT Law), in transactions exempted from VAT of Article 20.20 and 22 of the VAT Law, provided that the buyer has not waived this exemption, there is no payment obligation regarding VAT, provided the purchaser complies with the reverse charge procedure.

One of the points covered by the due diligence reports is identification of the most appropriate legal and tax scheme: share or asset deal.

In this regard, while asset deals are subject to VAT (in housing, at a 21 per cent rate) and stamp duty tax (which may vary between 0.25 per cent and 2 per cent, depending on the particular autonomous community), share deals are exempted from VAT but subject to transfer fees (which may vary between 2 per cent and 11 per cent, depending on the particular autonomous community), which constitute a cost and thus are non-recoverable.

Furthermore, in asset deal structures, it is key to check first if the acquisition should be purely an asset deal but not a running activity scheme. In this regard, the acquisition of a property in which the activity being developed has a greater influence on the transaction than the property itself, may lead the tax authorities to consider the deal as being closer to a transfer of a business rather than an asset, in which case, a transfer fee will apply instead of VAT.

This phase is crucial for determining the strategy of the transaction.

Binding offer and SPA/SPD

Once the due diligence report is confirmed, investors have to decide whether to present a binding offer and start negotiating the sale and acquisition deed (SPD) with the seller.

Should the binding offer be presented, in off-market deals, the exclusivity period extends until (1) the signing date of the transaction; or (2) until the exclusivity period foreseen for the signing has elapsed. Nevertheless, in competitive processes, two or three investors might advance to the through the binding phase, until one bidder is selected as the final purchaser.

Standard terms and conditions (e.g., representations and warranties) of the SPD are noted below in Section IV.ii.

ii Acquisition agreement terms

Overview

According to Spanish legislation, in asset deals, a real estate asset's ownership is not legally transferred until a public deed has been granted and registered in the corresponding land registry. However, in share deals, there is no transfer of the property's ownership, so there is only a transfer of the company's shares.

It is accepted that, prior to the signing of the SPD, a private sale and acquisition agreement (SPA) is signed, consolidating all the terms and conditions of the transaction. However, the SPA only proves useful when signed in off-market processes if some transaction issue has to be solved prior to the SPD.

Representations and warranties (R&W)

The terms and conditions in asset and share deals are quite different from each other. While in asset deals all terms refer to the asset and its main conditions (e.g., ownership, charges and encumbrances, horizontal property, works, licences, planning situation and tributes), in shares deals, the terms and conditions consider not only the situation of the property, but also the company that owns the real estate assets (e.g., in terms of corporate, tax, labour, public, litigation, insurance, contracts, real estate and planning, and IT or IP matters).

Standard R&W in commercial asset deals might cover the following:

a free and 100 per cent ownership (which means that the ownership title is currently registered in the corresponding land registry);
b free of charges and encumbrances, except for those described at (a);
c free of occupants and leases, except for those described at (b);
d no agreements in favour of third parties have been signed by the seller prior to the SPD;
e all licences and permits regarding the property have been granted, and are listed at (c);
f no taxes, expenses or amounts regarding the property are pending payment prior to the SPD;
g no litigation processes that may affect the property are currently under way, except for those described at (d); and
h the property is free of any pollution or environmental issues.

These R&W are usually accepted for commercial properties, offices, shopping malls and logistics premises during a standard period of two years from the signing of the SPD. Nevertheless, the Spanish Civil Code establishes that remedies for hidden defects may be legally requested during a term of six months.

Regarding the acquisition of plots, planning issues are a critical aspect of the R&W process. For instance, depending on the development situation of the plot, standard R&W would cover the urbanisation work development, the payment of the urbanisation costs and confirmation of the town hall having fully approved the urbanisation works.

Securities and deal protections

To secure some or all of the issues that may potentially arise either in the due diligence report or through the M&A transaction, the following guarantees are commonly accepted (listed in decreasing order of seriousness):

a first-demand bank guarantee;
b escrow bank accounts;
c deposits;
d first-demand contractual guarantee;
e subsequent or precedent conditions; and
f letter of comfort.

Closing and post-closing

In asset deals, the signing of the SPD finalises the closing of the transaction, and the ownership title can only be enforced against third parties in favour of the purchaser once the SPD has been registered in the corresponding land registry. Post-closing issues such as the achievement of precedent conditions (CPs), the completion and filing of the tax forms, and registration with the land registry are key.

On the other hand, in share deals, although the share acquisition agreement is usually concluded before a notary public, the ownership title does not need to be registered with any public body. In addition, post-closing requirements would possibly be limited to the completion of CPs and the completion and filing of the tax forms. The same procedure would be followed for the transfer of credits or loans.

iii Hostile transactions

As stated in the previous edition of *The Real Estate M&A and Private Equity Review*, given that, to its regular participants, the Spanish real estate market is relatively predictable, no hostile transactions have occurred.

iv Funding considerations

Since 2000, transactions have typically been funded with careful attention being paid to, and guarantees provided for, the real estate asset to be purchased, and the traditional Spanish banks continue to establish funding schemes on this basis.

While the Spanish real estate market's relative lack of sophistication means that the traditional funding schemes will continue, with the entrance of foreign investors into the market, new funding structures are arising, such as (1) the entrance of equity funding by means of foreign parent companies, and (2) the listing of companies on the Spanish stock market.

In this regard, the entrance of capital into the market by more opportunistic funds, with shorter investment terms, has provided the market with resources for the acquisition of portfolios. The entrance of core and core-plus investors is expected in 2016 and 2017, with the acquisition of properties owned by more opportunistic funds.

Additionally, companies such as Merlin Properties and Neinor Homes are gathering funds by means of the capital market. Other companies, such as Hotel Investment Partners or Aedas, are possibly preparing their listings. We can anticipate, therefore, the availability of economic resources in the Spanish market for the next two or three years.

v Tax considerations

Generally, second and subsequent transfers of built real estate assets are exempt from VAT. Nevertheless, purchasers (provided they are VAT-registered companies and can deduct, totally or partially, their VAT) can waive the exemption, in which case the waiver must be expressly stated in the sale and acquisition deed. Additionally, when the exemption is expressly waived, the reverse charge scheme would apply, with the purchaser then considered as a VAT payer.

When VAT is charged, stamp duty tax is also applied. Stamp duty is an independent fee and is only charged when three requirements are met, provided that the transaction is submitted for but not exempted from VAT, and the exemption is not waived (in which case a transfer fee, which is incompatible with stamp duty, is applied):

a the document must be either a public deed or a public document issued by an official or public body (e.g., a deed executed by a notary public or a concession granted by the city council);

b the document must be registered in the land registry; and

c the transaction made by means of the document must have an economic value (i.e., a sale and acquisition public deed).

If the purchaser cannot waive the VAT exemption (because the above-mentioned requirements are not met), a transfer fee shall be charged (between 2 per cent and 11 per cent of the property's market value), in which case the stamp duty fee is not applicable.

The transfer fee is considered a cost in a transaction, as it is not refundable and the payer is the purchaser.

vi Cross-border complications and solutions

From the tax and regulatory perspectives, two prerequisites should be taken into account by non-resident foreign investors: the standard money-laundering regulations, which basically focus on the origin and tracking of funds; and any double-taxation treaties between Spain and the investor's origin country.

Additionally, under Law 10/2010, the Anti-Money Laundering Law, notaries public request the actual ownership records of the parties to a transaction, to check and confirm the real ownership shareholdings of the companies involved.

Finally, market practice is demanding know-your-client (KYC) procedures in transactions, whereby investment funds and banking entities request the other parties to complete and sign representations. KYC forms usually describe key aspects of a company, such as its incorporation deed, shareholding, administrative body, identification of the directors, powers of attorney granted and the scheme of the company group.

V CORPORATE REAL ESTATE

Spanish corporate real estate transactions are influenced by foreign investors' market practice.

In this regard, a normal acquisition structure might involve creating a Spanish property company (propco) to acquire the company. The Spanish propco would be a subsidiary of a Spanish holding company (holdco), in turn owned by several holdcos, ultimately owned by the parent company, which benefits from a favourable tax scheme.

Since 2013, foreign investors have taken quota shares in Spanish banking platforms (Altamira, Aliseda, Aktua, Servihabitat, Haya Real Estate) and other Spanish companies. Consequently, foreign funds with no presence in the Spanish market have been trying to acquire Spanish companies, through which they can execute real estate transactions, either through equity or corporate loans.

VI OUTLOOK

It is anticipated that 2017 will be very favourable for the Spanish real estate market, with investment of €6 billion already registered up until June,[3] which indicates a 70 per cent increase in comparison with the first six months of 2016.

Although commercial and office premises are currently the stars of real estate investment this year, residential and hotel markets are clearly also developing, given that companies such as Neinor Homes (already listed), Aedas Homes, Kronos Investment, Hotel Investment Partners and other SOCIMIs that have been purchasing plots or hotels are currently seeking funds from the Spanish capital market.

3 Source: Jones Lang LaSalle.

SAREB is currently creating a SOCIMI to gather together all real estate assets that require management (i.e., plots and works in progress).

In this regard, these developers are currently initiating the construction of residential projects on the purchased plots, each of them delivering about 2,000 to 3,000 houses annually. For instance, according to the Spanish press, Neinor currently owns enough plots to build more than 10,000 houses in the next few years. Thus, developers are assuming a significant role in the market.

Another significant transaction that may have a deep impact on the market is the acquisition of Banco Popular by Banco Santander, for €1, on 7 June 2017.

According to some articles in the Spanish press,[4] this transaction implies that (1) Banco Santander has assumed €29.8 billion in real estate assets from Banco Popular; and (2) it shall put said real estate assets on the market within the next 18 months, to balance Banco Popular's accounts. Clearly, this situation may boost real estate activity during 2017 and 2018.

Finally, three locations are reaping all the significant investment in real estate: Madrid, Barcelona and the Costa del Sol. However, the excess of equity means investors are looking for other locations and assets. In any case, planning legislation that is more pragmatic, secure and homogenous is keenly sought by investors. This situation seems likely to boost the onset of foreign investment and funding in the management of plots pending urbanisation.

4 See, for example, *El Mundo*, 26 June 2017.

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Jaime has been recognised by the most prestigious international legal directories, such as *Chambers and Partners*, *The Legal 500* and *Best Lawyers*. He speaks fluent Spanish and English.

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